In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-808

KANSAS CITY AREA TRANSPORTATION AUTHORITY OF THE KANSAS CITY AREA TRANSPORTATION DISTRICT,

Petitioner,

vs.

JAMES G. ASHLEY, JR. and OLIVE J. ASHLEY, Individually and as Executrix of the ESTATE OF JAMES G. ASHLEY, SR., d/b/a KANSAS CITY PUBLIC SERVICE FREIGHT OPERATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT EN BANC

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Petitioner, Kansas City Area Transportation Authority of the Kansas City Area Transportation District (hereinafter "ATA"), prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri, En Banc, entered July 11, 1977, holding that ATA's power of condemnation pursuant to a bi-state compact sanctioned by Congress (Appendix C) has been preempted by federal law and that any acquisition of a railroad right of way by ATA may only be pursued under procedures contained in the Interstate Commerce Act, 49 U.S.C. Section 1a, and that the judgment be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, En Banc (Appendix A), is not yet reported. The opinion of the Missouri Court of Appeals, Kansas City District (Appendix B), is not reported.

JURISDICTION

The judgment of the Supreme Court of Missouri, En Banc, was entered July 11, 1977. Timely Motion for Rehearing was filed and was denied on September 12, 1977. This court has jurisdiction under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the Missouri Supreme Court, En Banc, in reversing a 1974 condemnation judgment for petitioner ATA against Respondents-Ashleys' Missouri railroad right-of-way easement on the grounds that ATA can only obtain involuntary possession of the Ashley railroad right-of-way easement from the Interstate Commerce Commission, under newly enacted (1976) 49 U.S.C. Section 1a(10), has denied ATA a "right, privilege and immunity" granted ATA by Congress in 1966 under Public Law 89-599, 80 Stat. 826, wherein Congress declared, in sanctioning the bi-state compact creating ATA, that ATA "shall be exempt from the applicability of the provisions of the Interstate Commerce Act, as amended, and the rules, regulations and orders promulgated thereunder."

2. Whether the Missouri Supreme Court, En Banc, in making what petitioner believes to be the first court interpretation of newly enacted 49 U.S.C. Section 1a(10), and in therefore deciding a federal question of substance, misread and misapplied said statute when it held that the statute gives exclusive jurisdiction to the Interstate Commerce Commission to dispose of railroad rights of way. Further, this interpretation, raised *sua sponte* by the Missouri Supreme Court, if allowed to stand, is a deprivation of ATA's property rights without due process of law in violation of the 5th and 14th amendments to the Constitution.

3. Assuming, *arguendo*, that no Congressional ICC exemption for ATA exists, has the Missouri Supreme Court, En Banc, by holding that only the Interstate Commerce Commission can effect transfer of respondents' railroad right-of-way easement to ATA, nevertheless denied ATA a "right, privilege and immunity" granted ATA under Public Law 89-599, 80 Stat. 826, by dismissing this case outright when it should have stayed this condemnation proceeding until the ICC determines whether it has jurisdiction.

STATUTORY PROVISIONS INVOLVED

This case involves Public Law 89-599, 80 Stat. 826; 49 U.S.C. § 1a; R.S.Mo. § 238.010 et seq.; and K.S.A. § 12-2524 et seq. These provisions are set forth in the Appendices beginning at p. A21, *infra*.

STATEMENT OF THE CASE

Summary

Respondents (hereinafter sometimes Ashleys) own a railroad right-of-way easement, eight and one-half miles long and mostly one hundred feet wide, located solely in Kansas City, Jackson County, Missouri, and which extends through a heavily populated residential area. (Plf. Ex. 2, R.69, R.96, Petition R.2-9). Under Missouri Real Property Law, because of the nature of the instrument by which Ashleys acquired title, Ashleys do not own the fee title in the land encompassing the right of way; they own only a right-of-way easement for railroad purposes over the land. (Appendix A, p. A2).

As a father-son partnership, Ashleys acquired this easement by Missouri Right-of-Way Deed in 1962 from the Kansas City & Westport Belt Railway Company. (Plf. Ex. 2, R.69). Ashleys also acquired two switching locomotives and they continued the business of the Westport Belt of switching and delivering carloads of freight received from connecting railroads until September, 1968. (R.39, 145 et seq.). At that time, business did not justify track-maintenance expense and the Ashleys (R.196) embargoed further public service (R.186), giving notice thereof to the Interstate Commerce Commission.

ATA was created by a compact between the States of Missouri and Kansas with sanction by Congress in 1966 for the purpose of operating and establishing passenger transportation systems within its area. (Public Law 89-599, 80 Stat. 826; R.S.Mo. Section 238.010; K.S.A. Section 12-2524). ATA has been attempting since 1970 to acquire first by purchase and then by condemnation the existing railroad right-of-way easement owned by the Ashleys

without disturbing or seeking the property rights of the many underlying fee owners. (Plf. Ex. C, R.21). Missouri property law limits the use of a railroad right-of-way easement to railroad purposes. ATA seeks this existing easement and desires to use it for railroad purposes in its planning for rail transportation of passengers within Kansas City, Missouri. (R.4-5).

ATA is not claiming and cannot claim abandonment of the railroad right of way by Ashleys because if abandonment were to be found to exist, the easement would cease to exist under Missouri law, and there would be no property right existing and owned by the Ashleys for ATA to acquire.

The Missouri Supreme Court, En Banc, has ruled that ATA's Condemnation Petition should be dismissed by the trial court because (citing a 1976 Amendment to the Interstate Commerce Act) only the Interstate Commerce Commission (hereinafter sometimes ICC) has jurisdiction to effect an involuntary transfer of this Missouri real property easement from the Ashleys to ATA. (Mo. Sup. Ct. Opinion, p. A5).

In consenting to the compact between Missouri and Kansas creating ATA, Congress added a special provision to Public Law 89-599, 80 Stat. 828, Section 2(b), which declares that ATA "shall be exempt from the applicability of the provisions of the Interstate Commerce Act, as amended, and the rules, regulations, and orders promulgated thereunder."

Procedural History

In 1970, ATA commenced this action in the Circuit Court of Missouri wherein it sought to condemn defendants Ashleys' railroad right-of-way easement and all other

railroad operational facilities pursuant to powers of condemnation granted ATA by compact as set out in R.S.Mo. Section 238.010, et seq. (Petition, R.2-9). This case has been considered by all three levels of the Missouri court system, Circuit, Appellate and Supreme, and each court has given a different interpretation of Public Law 89-599, 80 Stat. 826. (R.26 and Opinions Appendices A & B).

ATA is a body corporate of the States of Missouri and Kansas, created by compact between Missouri and Kansas and by Act of their respective legislatures (R.S. Mo. Section 238.010 and K.S.A. Section 12-2524) and sanctioned by Act of the Congress of the United States known as Public Law 89-599, 89th Congress, 80 Stat. 826. Defendants' railroad operation lies entirely within Jackson County, Missouri, which is a part of the Kansas City Area Transportation District. (Petition, R.2-9).

Defendants Ashley opposed the condemnation from the inception. Defendants, by motion to dismiss filed June 2, 1970, in the trial court, raised the following as part of their defenses:

> "1. That defendant's railroad right-of-way is a public highway dedicated to public railroad purposes (Missouri Constitution, 1945, Article XI Section 9) which cannot be discontinued by defendants without the authority and approval of the Interstate Commerce Commission and the Missouri Public Service Commission, which consents and authority and approval the Plaintiff Condemnor does not have or claim to have.
>
> "2. That the action in condemnation of Defendants railroad longitudinally by Plaintiff is the attempt to exercise power over and above any power granted to Plaintiff by Sec. 238.010 R.S. Mo. 1959 and Public Law 89-599, 89th Congress of the United States, 80 Stat. 826." (R.10).

On April 5, 1972, defendants' Motion to Dismiss was overruled. (R.26). Defendants renewed their motion to dismiss immediately preceding trial. (R.45). The trial court overruled the renewed motion. (R.46).

Following a trial on the issue of damages, defendants Ashley were awarded a jury verdict in the amount of $175,000. (R.469-470).

Defendants Ashley appealed the case to the Missouri Court of Appeals, Kansas City District, in Appeal No. 27,498. (R.482). Defendants Ashley raised the following as one of their issues on appeal:

> "The Plaintiff-Appellee is denied the power of condemnation of any railroad by the laws of the United States." (Ashley Appellate brief 30).

The Missouri Court of Appeals, Kansas City District, issued its opinion on December 31, 1975, reversing the trial court and ordering the cause dismissed for the reason that the Court of Appeals held that ATA does not have condemnation powers under the state laws of Missouri. (Appendix B). No federal issues were discussed in the opinion.

ATA timely filed a motion for rehearing and, following its denial, filed an Application for Transfer to the Supreme Court of Missouri, En Banc, the highest court in Missouri in which a decision could be had.

On April 14, 1976, the Supreme Court of Missouri, En Banc, ordered the cause transferred and the mandate of the Court of Appeals recalled and further ordered that the Court of Appeals take no further action in the cause.

The matter was reargued and on July 11, 1977, the Supreme Court of Missouri, En Banc, issued its opinion. (Appendix A). A timely motion for rehearing filed by ATA was overruled on September 12, 1977. The federal question involved is discussed by the Supreme Court of Missouri, En Banc, on page A3 of the opinion wherein it says:

> "The effect of ATA's condemnation action, if successful, would be that it would take over the entire railroad right-of-way and bring about a permanent and total secession of railroad service by appellant-railroad (Ashleys) as well as any other railroad over this entire line of track. The appellant-railroad, however, remains under the jurisdiction of the ICC and the legal abandonment of its line of track or discontinuance of service can only be accomplished by order of the ICC. 49 U.S.C. Sec. 1a(1) * * *."

The Missouri Supreme Court ordered that this case be dismissed outright, stating that a 1976 amendment to the Interstate Commerce Act, 49 U.S.C. Section 1a(10), would afford ATA the relief it seeks of acquiring involuntarily the Ashley railroad right-of-way easement.

This was the first instance in this case where a court had specifically ruled that the Interstate Commerce Act preempted Public Law 89-599.

One of the points ATA raised in its motion for rehearing, before the Supreme Court of Missouri was that the effect of the Court's holding was to negate portions of Public Law 89-599 and, furthermore, that the ICC procedure which the Court says ATA must follow was not even in existence either at the time the petition for condemnation was filed or at the time the condemnation judgment was entered.

Petitioner seeks review of the reversal by the Missouri Supreme Court and the holding by the Missouri Supreme Court which, in effect, is that a 1976 amendment to the Interstate Commerce Act impliedly repeals a substantial portion of the public law establishing this bi-state transportation authority.

REASONS FOR GRANTING WRIT

This case is novel because the Missouri Supreme Court, En Banc, has made what petitioner believes to be the first appellate court interpretation (albeit erroneous) of the meaning and effect of a 1976 Amendment to the Interstate Commerce Act. First, in doing so, the Missouri Supreme Court has ignored the exemption granted ATA by Congress from all provisions of the Interstate Commerce Act—a defense raised by ATA at all levels of the Missouri court system. Second, the Missouri Court has erroneously held that Congress has given the ICC power to force or to compel an owner of a railroad right of way to make an actual transfer of the right of way to another.

ATA is a bi-state area transportation authority, created by bi-state compact between Missouri and Kansas and sanctioned by Congress. Public Law 89-599, 80 Stat. 826 (1966).

"The construction of a compact sanctioned by Congress under Art. I, Section 10, Clause 3, of the Constitution presents a federal question." *Petty, Admrx.* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785 (1959). See also *Delaware River Joint Toll Bridge Commission* v. *Colburn, et al.*, 310 U.S. 419, 60 S.Ct. 1039 (1940), where it was held that a compact between states and sanction by Congress by virtue of Article I, Section 10, Clause 3 of the Constitution involves a federal "title,

right, privilege or immunity" which, when "specially set up and claimed" in a state court, may be reviewed in the Supreme Court on certiorari.

It is important to reemphasize that ATA is seeking to acquire by condemnation a railroad right-of-way easement only. The Ashleys own an easement for railroad purposes; they do not own the underlying fee to this 8-1/2 mile long, 100 feet wide easement. (Appendix A). Under Missouri property law, an owner of a railroad right-of-way easement may use it for only railroad purposes. *Missouri-Kansas-Texas Railroad Company* v. *Freer*, 321 S.W.2d 731 (Mo.App. 1958). Once such easement is no longer used for railroad purposes, it is deemed abandoned and it ceases to exist, thus freeing the underlying fee owners of the burden of the easement. *Schuermann Enterprises, Inc.* v. *St. Louis County, et al.*, 436 S.W.2d 666 (Mo. 1969).

Thus, ATA must follow the dictates of Missouri property law respecting railroad right of way easements, and it cannot place itself in the position of claiming abandonment of any kind before the ICC or any court, nor could it make any other use of the easement.

I. The Missouri Supreme Court Has Erroneously Ignored the Interstate Commerce Act Exemption Granted ATA by Public Law 89-599 When It Ruled That Only the ICC Can Make an Involuntary Transfer to ATA of Respondents' Missouri Real Property—a Railroad Right-of-Way Easement.

In 1966, Congress approved a bi-state compact between Missouri and Kansas creating ATA and giving it the powers to acquire, establish and operate public transportation systems in the Greater Kansas City Area, three counties in Kansas and four counties in Missouri.

Article III of the Compact (R.S.Mo. Section 238.010) reads, in part (Appendix C, pp. A22, A24 and D, p. A29):

> "There is created the Kansas City Area Transportation Authority of the Kansas City Area Transportation District (hereinafter referred to as the 'Authority'), which shall be a body corporate and politic and a political subdivision of the States of Missouri and Kansas.
>
> The Authority shall have the following powers:
>
> (1) To acquire by gift, purchase or lease and to plan, construct, operate and maintain, or to lease to others for operation and maintenance, passenger transportation systems and facilities, either upon, above or below the ground.
>
> * * *
>
> (9) To condemn any and all rights or property, of any kind or character, necessary for the purposes of the Authority, subject, however, to the provisions of this compact; . . . and if the property to be condemned be situated in the State of Missouri, the said Authority shall follow the procedure provided by the laws of the State of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways."

Section 2(b) of Public Law 89-599, 80 Stat. 826, provided further that the Interstate Commerce Commission *would not* have jurisdiction over ATA or the acts of ATA, which section reads in part (Appendix C, p. A27):

> "* * * the Kansas City Area Transportation Authority, as established in such compact, its affiliates and the transportation rendered by either, within such Kansas City Area Transportation District *shall be exempt from the applicability of the provisions of the*

Interstate Commerce Act, as amended, and the rules, regulations and orders promulgated thereunder * * *." (Emphasis added).

Obviously, this exemption created a right, privilege and immunity in ATA from the burdens of the Interstate Commerce Act, a federal statute.

House Report No. 1901, 89th Congress, 2d Session, recommended that the compact be approved. On page 7 of the Report is the following letter:

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN
Washington, D.C., May 20, 1966

Hon. Emanuel Celler,
Chairman, Committee on the Judiciary
House of Representatives, Washington, D.C.

Dear Chairman Celler:

This is in response to your letter of March 16, 1966, requesting a report and comments on a bill, H.R. 13385, granting the consent of Congress to the compact between Missouri and Kansas creating the Kansas City Area Transportation District and the Kansas City Area Transportation Authority. On behalf of the committee on legislation, I am authorized to submit the following comments:

The Commission has no objection to Congress granting the proposed compact.

Section 1 of the bill would create a compact between Missouri and Kansas creating the Kansas City Area Transportation District and the Kansas City Area Transportation Authority for the primary purpose of

operating passenger transportation systems and facilities. The authority would be given the necessary powers to establish, operate, and maintain such powers.

Section 2(a) of the bill would exempt the Kansas City Area Transportation Authority and its affiliates from the applicability of the provisions of the Interstate Commerce Act. We have no objection to this exemption.

Sincerely,

John W. Bush, Chairman
Lawrence K. Walrath,
Willard Deason,
Committee on Legislation.

In the face of this exemption granted ATA from all provisions of the Interstate Commerce Act, the Missouri Supreme Court has ruled that:

(1) ATA cannot acquire the Ashley railroad right of way by virtue of any procedure in a Missouri Court (thus ignoring ATA's Compact and Missouri statutory powers to condemn Missouri property in a Missouri Court, Section 238.010(1)); and

(2) ATA can only acquire the railroad right of way by applying to the ICC for an order that the Ashley embargoed and presently non-existing freight service be discontinued or for an order of abandonment; and

(3) ICC can then force the Ashleys to sell this railroad right of way to ATA pursuant to a 1976 amendment to the Interstate Commerce Act, 49 U.S.C. Section 1a(10). (Missouri Supreme Court Opinion, Appendix A).

The Missouri Supreme Court simply has ignored the Act of Congress which exempted ATA from the Interstate Commerce Act. The opinion makes no reference whatsoever to this exemption. Yet, this specific exemption was briefed and argued orally before the Missouri Supreme Court, En Banc. (ATA Brief 39-42). What makes the opinion's "exemption silence" even more amazing is the fact that the Missouri trial court, after written briefs and oral argument, recognized and accepted this exemption when it overruled Respondents-Ashleys' Motion to Dismiss ATA's condemnation petition. (R.26). Ashleys had raised the defense that the Interstate Commerce Commission had to give approval to condemnation of the railroad right of way and ATA countered such argument by raising its exemption from the Interstate Commerce Act.

ATA submits that the exemption means what it says. ATA is not required, contrary to what the Missouri opinion says, to avail itself of the provisions of the Interstate Commerce Act in order to acquire and effect transfer of this Missouri real property interest from Ashleys to ATA. This Missouri Supreme Court opinion is clearly repugnant to this Congressional exemption specifically granted ATA.

There is no case law interpreting the exemption. The Missouri Supreme Court has ignored it, and it seems unnecessary to cite other decisions of this Court that an Act of Congress is law and, unless unconstitutional, is required to be recognized and followed by all courts.

Notwithstanding ATA's exemption, the ICC procedure suggested by the Missouri Supreme Court should not even be applicable to ATA because the condemnation judgment was entered in 1974, with possession of the right of way previously delivered to ATA in 1973 pursuant to order

of the Circuit Court of Jackson County, Missouri, whereas the new Interstate Commerce Act amendments were not effective until 1976. The Missouri Supreme Court relied on 49 U.S.C. Section 1a(1) and (10) for authority that legal abandonment of the right of way or discontinuance of service can only be accomplished by an order of the Interstate Commerce Commission. However, the statute, Section 1a, was added to the federal statutes by Public Law 94-210, 90 Stat. 127, in February of 1976. For the most part it is not retroactive. 49 U.S.C. Section 1a(8). Prior to February, 1976, there was no comparable federal statute and no federal public policy as established by this new law. Thus, in 1970, when the condemnation petition was filed pursuant to the provisions of the compact, or in 1974 when the condemnation judgment was entered in favor of ATA, it was impossible for ATA to follow the procedure suggested by the Missouri Supreme Court. At these times, there was no such federal statute supposedly granting the Interstate Commerce Commission the power to forceably dispose of a right-of-way easement.

Petitioner acknowledges that the Interstate Commerce Commission has jurisdiction over railroad abandonments. However, it is submitted that this case is not an abandonment. Assuming ATA were to and could apply to the Interstate Commerce Commission for an ICC order authorizing abandonment of the Ashleys' railroad right of way, it is indeed likely that under Missouri state law the right of way would also be considered abandoned and the easement as a matter of Missouri law would cease to exist with all property rights reverting back to the abutting and underlying landowners. See e.g., *Hennick* v. *Kansas City Southern Ry. Co.*, 269 S.W.2d 646 (Mo. 1954), and *Roanoke Investment Co.* v. *Kansas City and S.E.R. Co.*, 108 Mo. 50, 17 S.W. 1000 (Mo. 1891). If this were to

occur, there would be nothing remaining for ATA to acquire by condemnation of the Ashley railroad right of way. Of course, ICC abandonment and Missouri state law abandonment may not be precisely equivalent, but why should ATA be forced to take such gamble (which could destroy Ashley's easement) when it is exempt from all provisions of the Interstate Commerce Act. See e.g., *Hennick, supra.*

Everything in this case indicates that the Ashleys do not want to dispose of the right of way. Neither side wants the Missouri courts or the ICC to rule that it has been abandoned. The solution in a case such as this has always been to refer to the condemnation laws and proceedings thereunder. Such laws permit governmental entities such as ATA to acquire the unique property interest it seeks for a higher and better use and also permits the private property owner just compensation for the property taken.

The Missouri Supreme Court attempts to circle this issue by saying (Appendix A), that the respondents Ashley remain subject to ICC jurisdiction and "abandonment of its line of track or discontinuance of service can only be accomplished by order of the ICC." Such a statement ignores the transaction contemplated in the instant case. Discontinuance of service does not accomplish, in and of itself, acquisition of the right of way. Also, this is not an abandonment, it is an acquisition. Actually, under the provisions of the Interstate Commerce Act, in order to commence acquisition proceedings it is the purchaser that must make application to the ICC. 49 U.S.C. Section 5(2), in effect at the time of the filing of this action, reads in part:

> "5, par. (2). Unifications, mergers and acquisitions of control.

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> (i) * * *; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *
>
> (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission * * *."

ATA did not seek such permission by filing an application in the instant case because its exemption from ICC approval, granted in Public Law 89-599, removed the necessity of seeking such approval.

It is respectfully submitted that the Missouri Supreme Court has ignored the federal laws as such are applicable to ATA or, if not ignoring them, has construed them in such a fashion which denies ATA the right to condemn without interference from the Interstate Commerce Commission. Such holding is repugnant to rights, privileges and immunities granted ATA by federal law.

II. The Missouri Court, in Deciding a Federal Question of Substance by Making a First Court Interpretation of a New Statutory Addition to the Interstate Commerce Act (49 U.S.C. Section 1a(10)), Has Misread and Misapplied the Statute.

National Policy

The opinion of the Missouri Supreme Court, En Banc, has significance beyond its adverse effect on ATA in that it makes what we believe is the first appellate court inter-

pretation of new amendments to the Interstate Commerce Act which were a part of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 90 Stat. 31. The Missouri opinion says:

> "We do not believe the ICC will allow this appellant-railroad to persist in a nonservice (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right of way easement in a metropolitan area out of public use in the face of the congressional intent evidenced by 49 U.S.C. Section 1a(10), which clearly demonstrates a national policy that unused railroad right of ways be utilized where feasible for other public purposes." (Appendix A, p. A5)

The Missouri opinion deals with national policy by holding that a public body such as ATA, or for that matter anyone, can only acquire an existing railroad right of way by and through the jurisdiction of the ICC. In essence, the opinion holds that courts, state or federal, have no jurisdiction in acquisition of rights of way by condemnation, and that the ICC now has the sole power to effect actual transfers of such real property interests by virtue of 49 U.S.C. Section 1a(10). This must be the intent of the opinion since it cites three pre-1976 cases where federal courts did not defer complete jurisdiction to the ICC but, instead, ordered acquisition proceedings stayed pending ICC approval—thus retaining jurisdiction to decide and effect the acquisition in the event of ICC approval. *City of Des Moines, Iowa* v. *Chicago & N.W. Ry. Co.*, 264 F.2d 454 (8th Cir. 1959); *New Orleans Terminal Company* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966); and *Commonwealth* v. *Bartlett*, 364 F.2d 819 (1st Cir. 1967).

ATA submits that the Missouri court has gone too far and has misread the language and the purpose of this new Section 1a(10), which reads:

> "In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission should make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such real properties not be sold, leased, exchanged or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes." (49 U.S.C. Section 1a(10). See Appendix F for entire text).

This statute is cast for those owners of railroad rights of way who propose to abandon the right of way. Section 1a(10) requires the owner to first offer the right of way to another on ICC terms for 180 days before it can be abandoned, if ICC believes the right of way is suitable for certain public purposes. The statute does not require the owner to make such offer. He need do so only if he wants an order of abandonment from the ICC.

The statute certainly is not tantamount, as the Missouri opinion would lead one to believe, to giving ICC the full power to force an owner of a right of way to execute a deed of transfer to another on ICC terms.

The Missouri opinion, in denying ATA its condemnation power, mistakenly believes the ICC can now make

"forced sales." Indeed, such interpretation flies in the face of all due process requirements of the Constitution. ATA and other similar governmental bodies having been given a power of condemnation are deprived of such rights in violation of the Fifth and Fourteenth Amendments to the Constitution by the Missouri Court's ruling that the ICC has the power to make "forced sales" of railroad rights of way.

It is patently absurd to read such powers into Section 1a(10). Yet, the Missouri Supreme Court has done so by telling ATA that Missouri courts cannot now utilize condemnation procedure to effect transfer of railroad rights of way because the ICC has been given such exclusive jurisdiction by Congress in this 1976 amendment.

The fact that the Missouri Court refused to heed ATA's suggestion, in ATA's motion for rehearing, that proceedings should only be stayed, not dismissed, because the ICC could not make such "forced transfers", supports ATA's argument here that the Missouri court believes Section 1a(10) is now the sole exclusive vehicle to achieve a forced acquisition (as in condemnation) by a governmental authority of an existing railroad right of way.

ATA's Dilemma

The language in Section 1a(10) that the Commission "shall order that such real property not be sold, leased, exchanged, or otherwise disposed of * * *" is not equivalent to granting the ICC jurisdiction to hear and decide condemnation cases. This statute may be effective to prohibit the Ashleys from disposing of the right of way, but nothing in the new law suggests that the ICC can order the Ashleys to sell to ATA at any price or on any terms fixed by the Commission. Furthermore, the language makes it evident that the ICC jurisdiction prohibiting a disposition continues for only 180 days following the order. The evidence in this case shows that negotiations were begun between ATA and the Ashleys on April 29, 1969, approximately eight and one-half years ago. (R.14-18). Thus, an order of the Interstate Commerce Commission prohibiting the Ashleys from otherwise disposing of their right of way for 180 days would be of little or no benefit to the ATA.

All the ICC can do under Section 1a(10) is to issue a "stop order" for 180 days—it cannot compel a transfer. Suppose, as is consistent with Ashleys' refusal to deal throughout the seven-year history of this case, Ashleys refuse to do anything during the 180 days. Must the ICC then issue an order of abandonment? Can ATA instead withdraw its application invoking Section 1a(10)? As discussed throughout this petition, abandonment is the last thing either party wants. In all events, under the peculiar circumstances here, the procedure would require ATA to play Russian roulette with an existing right-of-way easement it wants to keep alive.

The language of Section 1a(10) simply does not give ATA the means of seeking the relief it needs—a forced acquisition under condemnation principles of the Ashley right of way.

The Regulations recently promulgated by the ICC to implement Section 1a(10) confirm ATA's construction of the statute that it is not designed to permit the ICC to order or to demand a transfer of a right of way from one to another. 49 CFR Section 1121.39 reads as follows:

Section 1121.39—Public Use Procedures

(a) When the Commission finds that the present or future public convenience and necessity permit or require the abandonment of a rail line, it may

also make a finding that the rail properties are suitable for use for other public purposes. Such a finding shall be based upon representations of the parties and upon the Commission's own analysis of the record.

(b) When the Commission finds that the rail properties are suitable for use for other public purposes, the Commission shall condition any certificate issued to require that the properties be offered, upon reasonable terms, for acquisition for other public purposes.

(c) To assure compliance with such a condition, the Commission may postpone the effective date of a certificate for a period not to exceed 180 days to allow negotiations for acquisition of the properties for other public purposes.

(d) Such a postponement of the effective date of a certificate may run concurrently with any similar postponements required under Section 1a(4) of the Act or ordered to allow negotiation and execution of a financial assistance agreement under Section 1a(6) of the Act and Section 1121.38 of this subpart.

(e) When an agreement for acquisition of the properties for other public purposes is reached, the parties shall promptly serve a copy on the Commission and all other parties to the proceeding.

(f) When such an executed agreement is filed with the Commission, a certificate of abandonment shall be issued, which shall become effective and may be further conditioned in accordance with the provisions of Section 1a of the Act and these regulations.

There is nothing in the above regulation which requires a right of way to be sold for public purposes. It only says a rail line cannot be abandoned without being first offered for proper public purpose for 180 days.

Again, neither party wants abandonment. Abandonment, under Missouri law, causes the right-of-way easement to disappear and there is nothing to acquire. An abandonment proceeding before the ICC would be self defeating to both parties.

The dilemma is that ATA cannot, nor for that matter Ashleys cannot, ask for abandonment. Yet, the statute, as interpreted by the ICC regulations, speaks only of abandonment proceedings as the procedure to invoke Section 1a(10) as a means of offering (not requiring) a right of way for sale for public purposes.

The Missouri court has rested a decision in this case on an erroneous concept of the Interstate Commerce Act which, when examined, is impossible for ATA to follow and to obtain the relief it needs because it presupposes a complete relief-type of jurisdiction in the ICC which does not exist.

III. Regardless of ATA's Interstate Commerce Act Exemption, the Missouri Supreme Court Has Denied ATA Its Bi-State Compact Powers to Acquire Transportation Systems by Dismissing This Case Outright When It Should Have Stayed This Condemnation Proceeding Until the ICC Determines Whether It Has Jurisdiction.

Assuming no Congressional ICC exemption for ATA exists, it is ATA's position that any necessary ICC approval of discontinuance of Ashleys' ICC certificate should only require a stay of the Missouri condemnation proceedings

pending receipt of such ICC approval. An outright dismissal of this case, as ordered by the Missouri Supreme Court, is unwarranted and frustrates the intent of Congress in granting powers to ATA to exercise condemnation powers over Missouri property in Missouri courts.

At the very least, the Missouri Supreme Court should have recognized that it was making a most far-reaching interpretation of ICC powers under a new provision of the Interstate Commerce Act, and it should have stayed the condemnation proceedings so that a determination could be made by the ICC, upon application by ATA, whether the ICC has the jurisdiction and the power the Missouri Court says it has. As the case now stands, ATA's access to Missouri courts has been foreclosed. If the ICC dismisses such an application by ATA because it has no jurisdiction (which it clearly doesn't have) to compel a transfer of the Ashley railroad right of way, then ATA is left with no remedy. The Missouri decision is final and all of ATA's rights to acquire the right of way have been destroyed.

In ordering outright dismissal of this case which has been pending in Missouri courts since 1970, the Missouri Supreme Court has refused to recognize Congressional intent of giving sanction to the special acquisition powers granted ATA to create a comprehensive, unified and exclusive public transportation system. Evidence of legislative intent is contained in the July 21, 1966, *Report of the United States Senate Judiciary Committee*, submitted by Senator Edward Long of Missouri and accompanying Senate Bill 3051 as Report No. 1398 (Senate Calendar No. 1362, 89th Congress, 2nd Session), and particularly the following from pages 2 and 3 of said Judiciary Committee Report:

"In the past 20 years, the public transit situation of the Kansas City area has paralleled that of most metropolitan areas in the Nation—increasing competition from private motor cars, construction of freeways making the use of the private automobile more attractive; attendant increase in fares and continuing deterioration in service; financial inability of the private operator to expand service into the growing suburban areas.

* * *

"Faced with this situation, and realizing that mass public transit is one of the basic and fundamental necessities of the community, and that a prosperous and progressive urban area needs a balanced transportation system which can serve all districts within the area, the leaders of the various communities commenced exploring ways in which a solution could be sought. Because of certain tax advantages, the Congress passing the Urban Mass Transportation Act of 1964, and seeking to reinstill the confidence of the general public and the public officials in the transit operation, *it was concluded that public ownership and operation of the system would be the first step in such a solution.* Public ownership in this area is complicated by the fact that the metropolitan area is split by a State line and spreads into parts of seven counties in the two States, encompassing a large number of cities and towns from the small in population to the very large. After exploring various plans and organizations, it was decided that the only practical solution would be legislation by both Missouri and Kansas authorizing an interstate compact creating a transportation district and a transportation authority *with the powers to work toward a solution of this problem.*" (Emphasis added).

In the face of this intent to give ATA powers to work toward a solution of the problem of public transportation, the Missouri Supreme Court has told ATA to go to the ICC for solution of its problem here. Although we have questioned, *supra*, the power of the ICC to handle this problem, the point remains that Congress has told ATA it can acquire, by condemnation "any and all rights or property" in Missouri according to certain Missouri court procedure. It is a flagrant disregard of these rights, granted to ATA by Congress and the Missouri and Kansas legislatures, to deny ATA such access to Missouri courts.

Stays of such proceedings are recognized by Missouri courts. See *State* v. *Jones*, 396 S.W.2d 601, 605 (Mo. En Banc 1965). Even the three cases cited in the opinion by the Missouri Supreme Court, on another point, ordered a stay of proceedings pending ICC action before acquisition continued. In *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), the Fifth Circuit remanded to the district court with directions to permit the city, which wanted a portion of a railroad right of way for non-railroad purposes, to apply to the ICC for an abandonment order with jurisdiction remaining in the district court. In *City of Des Moines, Iowa* v. *Chicago & N.W. Ry. Co.*, 264 F.2d 454 (8th Cir. 1959), the Eighth Circuit, rather than dismissing the action, ordered that the cause be stayed pending ICC action by the City of Des Moines. The same procedure seems to have been followed in *Commonwealth* v. *Bartlett*, 384 F.2d 819 (1st Cir. 1967).

ATA is not seeking abandonment of the Ashley right of way; it seeks to acquire the right of way for railroad purposes. Several federal courts have ruled that a change in ownership such as would occur in the instant case is not equivalent to an abandonment. See e.g., *City of*

Alexandria, Louisiana v. *Chicago, Rock Island and Pacific Railroad Company*, 311 F.2d 7 (5th Cir. 1962); *ICC* v. *Chicago, Rock Island and Pacific Railroad Company*, 501 F.2d 908 (8th Cir. 1974); *Myers* v. *Arkansas and Ozarks Railway Corporation*, 185 F.Supp. 36 (W.D.Ark. 1960); *United States* v. *Certain Tracts of Land, Etc.*, 225 F.Supp. 549 (D.Kan. 1964).

We find no case which goes so far as to hold that the only jurisdiction for such involuntary acquisitions is the Interstate Commerce Commission, and none of the prior cases involved a fact situation wherein a bi-state authority, created by two states and specifically recognized by the Congress of the United States, was granted Congressional immunity from the far-reaching arms of the Interstate Commerce Commission. Instead, such cases generally provide that the court hold the case pending ICC approval. ATA suggested this procedure to the Missouri Supreme Court in its motion for rehearing, and the Court, in denying the motion, rejected the argument.

Assuming, *arguendo*, that the ICC exemption for ATA doesn't exist and never happened, then at the very least the federal rights granted ATA under the bi-state compact should dictate that the ICC need only give its blessing to discontinuance of the Ashley ICC certificate of freight service before the ATA's condemnation judgment can become final. This would give due recognition to the federal right granted ATA to acquire by condemnation Missouri property according to Missouri procedure. Ashleys have not provided freight service since 1968 and ICC approval of discontinuance would seem no obstacle.

But, as the case now stands, the Missouri Supreme Court has denied ATA access to Missouri courts. It has not stayed the proceedings for ICC approval. It has not

said, go to the ICC for approval and then come back and refile your suit. Instead, it says ATA cannot follow the procedure for acquisition of property granted by two state legislatures and Congress. It has ordered the case dismissed outright and told ATA to go to the ICC for any and all relief.

Moreover, since ATA's ICC exemption does in fact exist, all the more reason exists to stay the proceedings pending ICC acquiescence, as opposed to dismissal, if the language of the compact and Public Law 89-599 are to be given any credence.

Thus, at least, this Court should reverse the Missouri Supreme Court and order it to remand the case to the Missouri Circuit Court with directions to stay the condemnation judgment pending application by ATA within a reasonable time to the ICC for an order authorizing discontinuance of Ashleys' ICC Certificate for freight service, the receipt of which shall permit the judgment to become final or, if the ICC refuses to so discontinue Ashleys' certificate, this action shall be dismissed. If the ICC refuses to accept jurisdiction of such application, then the condemnation judgment also should then become final.

CONCLUSION

The Missouri Supreme Court, seemingly oblivious of the concept of bi-state compacts, has "washed its hands" of ATA's efforts to save for public use some eight and one-half miles of railroad right of way by pointing ATA in the direction of the Interstate Commerce Commission. In doing so, the Missouri Court has misread the intent and the language of a 1976 Amendment to the Interstate Commerce Act and has ignored the compact powers and the ICC exemption granted ATA by Congress.

In 1951, Mr. Justice Frankfurter, speaking for this Court in *State ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951), recognized that the growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of interstate compacts. He further stated that, "Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts." 341 U.S. at p. 28.

Petitioner asks that its compact powers be recognized so that it can attempt to deal with its twentieth-century urban transportation problems. For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

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December, 1977

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 59472

KANSAS CITY AREA TRANSPORTATION AUTHORITY OF THE KANSAS CITY AREA TRANSPORTATION DISTRICT,

Respondent,

vs.

JAMES G. ASHLEY, JR., and OLIVE J. ASHLEY, Individually and As Executrix of the Estate of JAMES G. ASHLEY, SR., d/b/a KANSAS CITY PUBLIC SERVICE FREIGHT OPERATION,

Appellants.

(Filed July 11, 1977)

Appeal From the Circuit Court of Jackson County
Honorable Forest W. Hanna, Judge.

This appeal arises from a condemnation proceeding brought by the Kansas City Area Transportation Authority of the Kansas City Area Transportation District (ATA) against defendants-condemnees, the Ashleys. The Ashleys appealed to the court of appeals, Kansas City district, after a jury verdict assessing damages at $175,000 for the taking of the right of way and operating equipment of a freight railroad operated by the Ashleys. The court of appeals reversed and remanded with directions to enter an order of dismissal. We transferred the case to this court pursuant to art. V, sec. 10, Mo.Const.

A short synopsis of the relevant facts is all that is necessary. ATA was organized under a compact agreement between the state of Kansas and the state of Missouri. This compact was authorized by the legislature and is set forth in full in section 238.010, RSMo 1969. Section 238.030 authorized the ATA to seek the approval of Congress for the compact. The approval of the Congress of the United States was obtained in 1968 under Public Law 89-599, 80 Stat. 826.

The Ashleys, defendants in the condemnation suit, are a co-partnership, the immediate grantees of the Kansas City & Westport Belt Railway Co. The Ashleys purchased from the railway company an operating freight line and in addition acquired a right-of-way easement which ATA now seeks to condemn. The transfer from the railway company to the Ashleys was approved by the Interstate Commerce Commission (ICC) as evidenced by its certificate and order. The property sought to be condemned extends generally from a point at 40th and Main Street in Kansas City, Missouri, to a switching facility located in the southwestern portion of Jackson County, Missouri. The right of way varies from 50 to 100 feet in width and has several lots or parcels appurtenant to it used for a variety of purposes at the present time, but which were originally used for railroad purposes in the switching and loading of freight trains.

From 1957 to 1962 the Ashleys performed all freight switching operations over the right of way as an independent contractor for the Kansas City & Westport Belt Railway Co. In 1962 the Ashleys negotiated for and purchased the railroad right of way and rights to continue the switching operations. In 1968, however, after a decline in business, the Ashleys, with the approval of the ICC, embargoed the entire railroad. This embargo meant the Ashleys would no longer accept any freight traffic or deliver any freight on any point of the railroad. Such embargo has continued

through the present. It appears that all of the parties and the ICC view this as an operating railroad regardless of the embargo and the present physical condition of the track, roadbed, and equipment.

Although a number of contentions are made by appellants contesting the right of the ATA to acquire their right of way by condemnation, the decisive fact which controls our decision in this case is that appellant-railroad is a common carrier engaged in interstate commerce and is, therefore, under the jurisdiction of the ICC. 49 USC sec. 1. It is true that appellant-railroad has rendered no service since appellants sought and obtained the consent of the ICC to an embargo of its entire line of track in 1968. Furthermore, a reading of prior cases involving this appellant and this right of way, together with the record and briefs in this case, strongly indicates that there has been a de facto abandonment of all railroad service by appellants and that no resumption of railroad service by this appellant-railroad is anticipated in the foreseeable future. Seventy-Ninth Street Improvement Corp. v. Ashley, 509 S.W.2d 121 (Mo. 1974); Kansas City Area Transportation Auth. v. Ashley, 478 S.W.2d 323 (Mo. 1972); Kansas City v. Ashley, 406 S.W.2d 584 (Mo. 1966); Kansas City Area Transportation Auth. v. Ashley, 485 S.W.2d 641 (Mo.App. 1972).

The effect of ATA's condemnation action, if successful, would be that it would take over the entire railroad right of way and bring about a permanent and total cessation of railroad service by appellant-railroad as well as any other railroad over this entire line of track. The appellant-railroad, however, remains under the jurisdiction of the ICC and the legal abandonment of its line of track or discontinuance of service can only be accomplished by order of the ICC. 49 USC sec. 1a(1); Commonwealth v. Bartlett, 384 F.2d 819 (1st Cir. 1967), 266 F.Supp. 390 (U.S.D.C.

Mass. 1967); New Orleans Terminal Company v. Spencer, 366 F.2d 160 (5th Cir. 1966); City of Des Moines, Iowa v. Chicago & N.W. Ry. Co., 264 F.2d 454 (8th Cir. 1959).

Title 49 USC sec. 1a(1) prohibits any railroad subject to that chapter from abandoning all or any portion of its lines of railroad[1] or discontinuing rail service without a certificate issued by the ICC. It also provides: "Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body." Under other provisions of Title 49 USC sec. 1a, the ICC is required to consider a number of factors in arriving at a decision regarding abandonment and is afforded the alternative of allowing another to provide rail service over the line of track (49 USC sec. 1a(6)), or allow a disposition of the properties for other public purposes, including mass transportation (49 USC sec. 1a(10)).[2]

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1. Certain types of trackage are exempted which are not pertinent to this case but which were the subject of Seventy-Ninth Street Development Corp. v. Ashley, *supra*.

2. "(10) In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.

Although the federal act does not specifically provide for the petition for abandonment or a petition seeking to revoke or terminate a certificate of convenience and necessity previously issued to be filed by an interested party, such as ATA, federal cases hold that such may be done. See Commonwealth v. Bartlett, *supra*, and New Orleans Terminal Co. v. Spencer, *supra*.

We do not believe the ICC will allow this appellant-railroad to persist in a nonservice (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right-of-way easement in a metropolitan area out of public use in the face of the congressional intent evidenced by 49 USC sec. 1a(10), which clearly demonstrates a national policy that unused railroad right of ways be utilized where feasible for other public purposes.

The other issues briefed by the parties need not be reached. The ICC is the agency which, at the present time, has jurisdiction of the matters involved in this case. The court erred in overruling appellants' motion to dismiss.

The judgment is reversed and remanded with directions to enter an order of dismissal.

John E. Bardgett, Judge.

Morgan, C.J., Henley, Finch, Donelly
and Seiler, JJ., concur;

Rendlen, J., not participating because not
a member of the court when cause was submitted.

APPENDIX B

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

KANSAS CITY AREA TRANSPORTATION AUTHORITY of the KANSAS CITY AREA TRANSPORTATION DISTRICT,

Respondent,

vs.

JAMES G. ASHLEY, JR. and OLIVE J. ASHLEY, individually, and as Executrix of the Estate of James G. Ashley, Sr., d/b/a KANSAS CITY PUBLIC SERVICE FREIGHT OPERATION,

Appellant.

(Filed December 31, 1975)

Appeal From the Circuit Court of Jackson County
Honorable Forest W. Hanna, Judge

Before Wasserstrom, P.J., Shangler, J., and Dixon, J.

This appeal arises from a condemnation proceeding brought by the Kansas City Area Transportation Authority of the Kansas City Area Transportation District. The defendant-condemnees were the Ashleys who appeal from a jury verdict assessing their damages at $175,000 for the taking of the right of way and operating equipment of a freight railroad which had operated over trackage popularly referred to as the "Country Club car line" in Kansas City, Missouri.

Only such factual matter as is necessary for the delineation of the dispositive issue in the case need be stated.

ATA is organized under a compact or agreement between the State of Kansas and the State of Missouri. This compact is set forth in full, together with the authority to execute the same in Section 238.010 RSMo 1969. The compact was authorized by the legislature in the Laws of 1965. The statute by Section 238.030 authorized the ATA to seek the approval of Congress for the compact. Such approval of the Congress of the United States was obtained in 1968 under Public Law 89-599, 80 Stat. 826. The specific provisions of the compact relevant to the issue to be decided will be noticed in the course of the opinion.

The Ashleys, defendants in the condemnation suit, are a co-partnership, the immediate grantees of the Kansas City and Westport Belt Railway Company. The Ashleys purchased from that Railway Company an operating freight line. As a result of that purchase, Ashleys acquired a right of way easement over the premises ATA now seeks to condemn. Transfer from the railway company to the Ashleys was approved by the Interstate Commerce Commission as evidenced by its certificate and order. The property sought to be condemned extends generally from a point at 40th and Main Street in Kansas City, Missouri to a switching facility located in the southwestern portion of Jackson County, Missouri. The right of way varies from 50 to 100 feet in width and has several lots or parcels appurtenant to it used for a variety of purposes at the present time, but which were originally used for railroad purposes in the switching and loading of freight shipments. After the condemnation petition was filed by the ATA, the Ashleys raised by appropriate motion to dismiss the petition the question of the authority of the ATA to bring the instant condemnation suit. That motion was, by the trial court, overruled, and the Ashleys have by appropriate action saved and preserved for determination here the ultimate

and dispositive issue of the authority of the ATA to condemn an existing railroad right of way.

A restatement of basic condemnation principles will serve to bring into focus the contentions of the parties respecting the issue. The authority to condemn inheres in the sovereign and is based upon the sovereign's power to protect and promote the public welfare. State ex rel. Lane v. Pankey, 359 Mo. 118, 221 S.W.2d 195 (banc 1949), City of Norton v. Lowden, 84 F.2d 663, 665 (10th Cir. 1936). That inherent power may be exercised only by the sovereign or by an entity to which the sovereign has delegated the power. Obviously, the delegation of the sovereign power must be by statute. The rule is well settled in this state that such statutes are to be strictly construed. State ex rel. Missouri Water Company v. Bostian, 365 Mo. 228, 280 S.W.2d 663 (banc 1955), State ex rel. Schwab v. Riley, 417 S.W.2d 1 (Mo. banc 1967). A right to condemn is not to be "implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication," 1 Lewis on Eminent Domain § 371, quoted in State ex rel. Cranfill v. Smith, 330 Mo. 252, 48 S.W.2d 891, 893, 81 ALR 1066 (banc 1932); State ex rel. Missouri Water Company v. Bostian, supra; State ex rel. Schwab v. Riley, supra.

Nonetheless, the rule of strict construction does not permit a construction "so as to defeat the evident purpose of the Legislature." State ex rel. Siegel v. Grimm, 314 Mo. 242, 284 S.W. 490, 493 (banc 1926).

Both parties to this appeal recognize the general principles set forth. The dispute centers as always on the application of the principles.

ATA first boldly asserts that the compact from which its powers are drawn is an express grant of the legislature to condemn defendants' railway.

ATA argues that the general grant of the power of condemnation to the authority "to condemn any and all rights or property, of any kind or character, necessary for the purposes of the Authority" and the fact that only property held by any state, county, city, village, township, or other political subdivision was excepted constituted a clear grant of authority to condemn defendants' railroad. In a fallback position in the same point, ATA argues that the power must be implied from the legislatively mandated purpose of the authority which ATA says is "to provide public ownership of such transportation facilities." The adroit manipulation of the express language of the compact will be later noted, but it is sufficient here to set forth the exact language of the compact:

"The Authority shall have the following powers:

(1) To acquire by gift, purchase or lease and to plan, construct, operate and maintain, or to lease to others for operation and maintenance, *passenger transportation systems and facilities*, either upon, above or below the ground." Article III(1), Section 239.010 RSMo 1969. (Emphasis supplied.)

Both the contention of express authority and implied or necessary authority are fully answered by the Supreme Court decision involving the same defendants and the same issues. In Kansas City v. Ashley, 406 S.W.2d 584 (Mo. 1966), the City of Kansas City, acting under the City Charter of that municipality, sought to condemn the railroad right of way here in question. The ordinance authorizing the condemnation asserted it was for the purpose of creating a controlled access freeway. The Charter provision concerning condemnation there in question reads as follows:

". . . 'to exercise the right of eminent domain and to condemn property, real or personal, or any right, interest, easement, restriction or use therein within or without the City or state for any public or municipal use or purpose,' Article I, Section 1(9), Kansas City, Missouri, Charter, 1956, . . ." (l.c. 588)

The original ordinance was drafted to permit joint use by the City and the Kansas City Public Service Co. which was then operating the railroad. After suit was filed, Kansas City Public Service Co. changed its name to Kansas City Transit and conveyed its interest in the railroad to Kansas City and Westport Belt Railway, and it transferred the same to the Ashleys who were continuing the railroad operation under authority of the ICC and the Missouri Public Service Commission.

The City amended its ordinance to remove any provisions for joint use and proceeded in the condemnation suit. In this posture, the court pointed out in its opinion the reservation of a railroad use was deleted and the railroad was absolutely deprived of its easement.

A motion to dismiss was filed by the Ashleys and some abutting property owners challenging the power of the City to condemn. The trial court sustained the motion to dismiss and the Supreme Court affirming that ruling.

The following excerpts from the opinion will demonstrate the conclusive effect of that opinion on the instant case:

"It is admitted that this is an attempt to condemn a railroad right of way lengthwise or longitudinally at a time when it was devoted to a public use by operation of a railroad thereon;

. . .

Appellant contends that under its constitutional charter it 'has broad powers of eminent domain and may exercise same to take the railroad right-of-way described. . . .'

. . .

In making the argument appellant recognizes the exception when the condemnor seeks 'to devote same to a conflicting or inconsistent use.' The general rule is stated in 29A C.J.S. Eminent Domain, § 74, page 326: '* * * property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient, and this rule has been held to apply except 'where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, * * * rather than by a * * * municipality.' State ex rel. State Highway Commission v. Hoester, Mo., 362 S.W.2d 519, 522[2, 3]. . . .

Kansas City does not possess any powers of the sovereign to enable it to condemn property already devoted to public use as can the State of Missouri, State v. Hoester, supra, and the United States, United States v. Carmack, 329 U.S. 230, 236, 67 S.Ct. 252, 91 L.Ed. 209; its charter provides only for a general right of condemnation, and it does not provide specifically for taking the easement of a railroad company. It is, therefore, subject to the general propositions previously stated.

> . . . Certainly the effect of the stated taking would be inconsistent with and in conflict with continued use of the land by the railroad; the taking would materially impair, injure, and interfere with such use; . . . Kansas City does not have the power, absent consent of all interested parties, either *expressly* or *impliedly*, to exercise its right of eminent domain to that extent." 406 S.W.2d at 587-590 (emphasis added).

Applying this decision to the present controversy, it is clear that no differences of fact or language appear that would distinguish the cited case.

The only statutory language the Authority can rely on for express authorization is the language that permits condemnation "necessary for the purposes of the Authority." This language is no different in import than the language which, in Kansas City v. Ashley, supra, was held not specific enough to permit the City to condemn the Ashleys' railroad. That language read, "for any public or municipal use or purpose."

ATA also argues that since railroad property is not specifically excepted from the general condemnation provision along with political subdivisions, it is expressly included as property subject to condemnation.

The difficulty is that the exception does not relate to the *kinds* of property to be condemned; it is aimed at the class of *owners* whose lands may not be condemned. The argument proves too much. If, as ATA suggests, this creates a power to condemn any kind or class of property not owned by political subdivisions, it would empower the ATA to condemn any property of any railroad. Many railroads operate in the area of the Authority's scope and to infer a power to terminate the services of a major railroad is absurd.

ATA attempts to distinguish Kansas City v. Ashley on two grounds. First, ATA asserts the taking there was only a partial taking, an assertion which is completely answered by the Supreme Court in its opinion when, in answering an argument that the prior public use was not being destroyed, said, l.c. 590:

> "[T]his ordinance (and pleading) was amended by enactment and filing of Ordinance 26364 and by its clear and unequivocal language, the railroad reservation is deleted and it is absolutely deprived of its easement and the use of it."

The second ground of distinction asserted is that in the instant case there is a "like use" and the ATA is taking for a "like purpose but a higher public use." Here, it is sufficient to say that the insistence of ATA that their purpose includes "mass transportation systems," thus embracing the Ashleys' *freight operation*, flies in the face of the legislatively stated purpose to provide "*passenger transportation systems*."

In any event, even if a like use is presumed, the cases cited by ATA do not support such a theory. In City of Palm Bay v. General Development Util., Inc., 201 So.2d 912 (Fla. App. 1967), the city sought to condemn defendant's water and sewer system which was within the city limits. The court did say, l.c. 917, "a municipality may, under general statutory authority, take by eminent domain the property of a private corporation already devoted to a public use and devote it to a like purpose." However, on its facts, the "general statutory authority" was authorization for any Florida municipality to carry into effect its powers, including building water supply systems, by exercise of eminent domain over "railroads, traction and street car lines," etc., and "*any other public or private lands or property whatsoever* necessary" to

accomplish the purpose, l.c. 914. The ATA has no similar statutory grant to condemn other public properties.

In Illinois Cities Water Co. v. City of Mt. Vernon, 11 Ill.2d 547, 144 N.E.2d 729, 68 ALR2d 384 (1957), there was specific statutory authority for municipalities to acquire the class of public utility condemned. Nor is Fifth Avenue Coach Lines, Inc. v. City of New York, 11 N.Y.2d 342, 183 N.E.2d 684, 229 N.Y.S.2d 400 (1962), supportive of ATA's position. There was specific legislation authorizing acquisition of bus lines by the city. In any case, the decision does not stand for anything for purposes of this decision, because the New York Court specifically narrowed the decision to an issue of notice, not reaching the issue of condemnation for a larger public use. Forestvale Cemetery Ass'n v. Helena Cemetery Ass'n, 62 Mt. 52, 203 P. 359 (1921), is even more irrelevant. The case was decided on a holding that the land being condemned was private property capable of any use to which the owner might devote it, because the Forestvale Association's public charter had expired.

So, it appears that ATA's reliance on the greater public interest rule is misplaced. Statutory authority for the taking is lacking, and it cannot be supplied by a general grant of authority to condemn.

There is, however, still another part of the compact which when read in the light of these facts demonstrates the legislature did not intend to grant such a broad power of condemnation. Article III, Sec. 1 of 238.010 RSMo 1969, permits acquisition of *passenger transportation systems and facilities* by gift, purchase, or lease. Acquisition by condemnation is not listed, and the rule of construction applicable is that where special methods are expressly prescribed for the exercise of a power, other procedures are excluded. Brown v. Morris, 365 Mo. 946, 290 S.W.2d 160

(banc 1956); Kroger Grocery & Baking Co. v. City of St. Louis, 341 Mo. 62, 106 S.W.2d 435, 111 ALR 589 (1937). All provisions of a statute should be construed together and harmonized if possible. State ex rel. McCubbin v. McMillian, 349 S.W.2d 453 (Mo. App. 1961). If there is an irreconcilable difference, the specific should prevail over the general. State ex rel. City of Kirkwood v. Smith, 357 Mo. 518, 210 S.W.2d 46 (banc 1948).

Clearly, the condemnation power is general, and the right to acquire other passenger transportation systems is specific and excludes the right to condemn. Adverting now to the manner of statement of the purposes of the Authority, the express purposes allow only acquisition and operation of "*passenger transportation systems,*" and not, as ATA has adroitly reworded the purpose clause to read, "*mass transportation systems.*"

The property here sought to be acquired is not now a *passenger transportation system.* The slight but important way in which ATA changed the language of its powers of acquisition to read "*mass transportation systems*" broadened the language to support its argument of implied necessity, but that "boot strapping" cannot prevail.

Whether there is implied authority is not a question of power. It is a question of legislative intent. Carmack v. United States, 135 F.2d 196 (8th Cir. 1943). Jurisdictions differ over what circumstances are sufficient to imply condemnation authority. Generally, the implication must be "necessary to permit the beneficial enjoyment and efficient exercise of a power expressly granted." That a taking will convenience the condemnor is insufficient. "The implication does not arise if the power expressly conferred can by reasonable intendment be exercised without the appropriation of property actually used for another public use. . . ." Some jurisdictions define necessity as when

the purpose of the legislation would be defeated without condemnation authority over a public use. Others use a reasonably necessary standard. 29A C.J.S., § 74, at 330.

ATA has cited fragmentary quotations from textbooks and encyclopedias to support its position as to the necessary implication of legislative intent. These fragments standing alone might seem to support the position of ATA. When read in context and when the supporting authority is examined, it is clear neither the textual material nor the case law support the ATA contention.

The cases cited by ATA do not support its broad claim of implied necessity. State ex rel. Schwab v. Riley, supra, is inapposite because necessary implication was construed in the context of condemning land not already devoted to another public use. The question of implied necessity was not reached in State ex rel. Missouri Water Company v. Bostian, supra. ATA cites Louisiana Power and Light Company v. City of Houma, 229 So.2d 202 (La. App. 1969), for the proposition that withholding condemnation power over privately owned transportation systems would render the statute creating the Authority meaningless. That case supports no such argument. The Louisiana appellate court held that a major utility could not condemn part of a city utility under its grant of general condemnation authority. There was no necessary implication of condemnation power because the major utility's purposes would not be defeated or rendered meaningless without that power, l.c. 207-208. In State of Missouri v. Union Electric Light & Power Co., 42 F.2d 692 (W.D. Mo. 1930), the Federal Power Commission had licensed the Union Electric Company to build a dam on the Osage River, for the "improvement of navigation" and "development of power." Under the provisions of the Act of Congress

(16 USC § 814 Section 21), the right of eminent domain was conferred upon a licensee as follows:

> "When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, . . ." (l.c. 697).

Based upon a finding that the express purpose was to permit the construction of a dam at a particular site, the court held the power to condemn included the power to condemn property already devoted to public use, the court concluding that the *improvement* was impractical or impossible without such power.

The ATA does not attempt to argue that its *purpose* will be defeated if it cannot condemn the Ashley line. The ATA is operating without this easement and has not attempted to show how the right of way is necessary for its purposes. There is no authority to condemn this easement on a theory of implied necessity.

ATA also contends for applicability of the theory that property already devoted to a public use may be condemned for a like purpose. The argument is that transfer of ownership to the public constitutes a larger public use and more general public benefit, thereby justifying condemnation. The Authority says the principle is applicable even when the condemnor acts under grant of general eminent domain power. "Rail public transportation service," says the ATA, is the like purpose.

The condemnation petition says nothing about *rail* transportation service. It refers only to *mass* transportation *for passengers*. In Kansas City v. Ashley, supra, the condemnation petition specified the taking was for

street purposes. When the City argued that it did not seek to destroy the existing use, implying coexistence of the street and rail uses, the Court said the ordinance of taking should have spelled out that fact. In the instant case, there is no evidence of any intention to continue rail use of the easement. And of course the ATA cannot continue use of the easement for rail freight purposes.

Independent of the issues raised by ATA is another exception to the general rule forbidding condemnation of a property already devoted to a public use. [P]roperty which is owned by a corporation whose business constitutes a public use, but which is not in actual use or essential to the exercise of the corporation's franchise, stands on the same footing as that of a private individual, and may be condemned by another corporation under the general laws," 29A C.J.S., § 74, at page 331. This principle is stated in a Tenth Circuit case from Kansas, where it was found, however, that the land condemned was in actual use. City of Norton v. Lowden, 84 F.2d 663 (10th Cir. 1936). In State v. Kansas City, 187 Kan. 286, 356 P.2d 859 (1960), land was annexed from a township. The city condemned township water supply systems within the annexed area. Since the township could not supply water within the city limits, its property there was unusable. The Kansas Supreme Court said the property could be condemned on the principle that property belonging to a public utility company but no longer devoted to a public use or having a reasonable probability of being so used may be condemned under a statute conferring eminent domain power in general terms. The principle also is stated in Brittain v. Southern Railway Company, 280 Ala. 650, 197 So.2d 453 (1967); Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co., 67 Kan. 569, 70 P. 939 (1902), reversed on rehearing 67 Kan. 580, 73 P. 899 (1903) (railroad lands could not be condemned

because they were still in use); Michigan State Highway Com'n v. St. Joseph Township, 48 Mich. App. 230, 210 N.W.2d 251 (1973) (land dedicated for a park could be condemned under general grant of eminent domain since it was not in use as a recreation area); and 1 Nichols, Eminent Domain (3d ed.) Sec. 2.2, pp. 203-211, and cases cited.

This principle of abandonment can have no application on the facts of this case.

Abandonment of a railroad has a specific definition in Missouri law. In Hennick v. Kansas City Southern Ry. Co., 364 Mo. 883, 269 S.W.2d 646 (1954), the court, in considering the claims of adjoining landowners that a railroad right of way had been abandoned announced the applicable principles as follows:

"An easement may be extinguished by abandonment. American Law of Property, Vol. II, § 8.96, p. 302; Powell on Real Property, Vol. 3, § 423, p. 493; St. Louis-San Francisco R. Co. v. Dillard, 328 Mo. 1154, 1162, 43 S.W.2d 1034, 1038[12]. Whether there has been an abandonment is a question of fact. 17 Am. Jur., Easements, § 142, p. 1026. An Abandonment is proved by evidence of an intention to abandon as well as of the act by which that intention is put into effect; there must be a relinquishment of possession with intent to terminate the easement. Hatton v. Kansas City C. & S. R. Co., 253 Mo. 660, 676, 162 S.W. 227, 232.

While an intention to abandon may be inferred from circumstances strong enough to warrant that inference, an abandonment must be proved by clear and convincing evidence. St. Louis-San Francisco R. Co. v. Dillard, supra, 43 S.W.2d 1038 [12] [13]."

In addition, the Ashleys here are operating under an embargo authorized by the regulations of the Interstate Commerce Commission, 49 CFR 1006, and which permits interruption of service. For the conditions under which an abandonment of a railroad under ICC jurisdiction may occur as well as the procedure for the same, see United States v. Snyder, 505 F.2d 595 (5th Cir. 1974), Cert. denied 420 U.S. 993 (1975), and I. C. C. v. Chicago, Rock Island and Pacific Railroad Co., 501 F.2d 908 (8th Cir. 1974), Cert. denied 420 U.S. 972 (1975).

Under either the applicable rules of Missouri or the ICC, no abandonment is shown, and the public use continues. This being so, the taking here cannot be justified on the ground that no other present public use is involved.

There being no power in ATA to condemn the Ashleys' property, the trial court was without jurisdiction, and the Ashleys' motion to dismiss should have been sustained.

The cause is reversed and remanded with directions to enter an order of dismissal.

All concur.

David J. Dixon, Judge

APPENDIX C

Transportation Compact—Missouri and Kansas

PUBLIC LAW 89-599; 80 STAT. 826
[S. 3051]

An Act granting the consent of Congress to the compact between Missouri and Kansas creating the Kansas City Area Transportation District and the Kansas City Area Transportation Authority.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Subject to the provisions of section 2 of this Act, the Congress consents to the compact between the States of Missouri and Kansas which reads as follows:

"COMPACT BETWEEN MISSOURI AND KANSAS CREATING THE KANSAS CITY AREA TRANSPORTATION DISTRICT AND THE KANSAS CITY AREA TRANSPORTATION AUTHORITY.

"The States of Missouri and Kansas solemnly agree:

"ARTICLE I.

"They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the Kansas City Area Transportation District, holding in high trust for the benefit of its people and of the Nation, the special blessings and natural advantages thereof.

"ARTICLE II.

"To that end, the two States create a district to be known as the Kansas City Area Transportation District (hereinafter referred to as 'The District'), which shall embrace the following territory: The Counties of Cass, Clay, Jackson and Platte in Missouri, and the Counties of Johnson, Leavenworth and Wyandotte in Kansas.

"ARTICLE III.

"There is created the Kansas City Area Transportation Authority of the Kansas City Area Transportation District (hereinafter referred to as the 'Authority'), which shall be a body corporate and politic and a political subdivision of the States of Missouri and Kansas.

"The Authority shall have the following powers:

"(1) To acquire by gift, purchase or lease and to plan, construct, operate and maintain, or to lease to others for operation and maintenance, passenger transportation systems and facilities, either upon, above or below the ground.

"(2) To charge and collect fees and rents for use of the facilities owned or operated by it.

"(3) To contract and to be contracted with, and to sue and to be sued.

"(4) To receive for its lawful activities any contributions or moneys appropriated by municipalities, counties, or by the Federal Government or any agency or officer thereof or from any other source.

"(5) To disburse funds for its lawful activities and fix salaries and wages of its officers and employees.

"(6) To borrow money for the acquisition, planning, construction, equipping, operation, maintenance, repair, extension, and improvement of any facility which it has the power to own or to operate or to own and to operate, and to issue the negotiable notes, bonds or other instruments in writing of the Authority in evidence of the sum or sums to be borrowed.

"(7) To issue negotiable refunding notes, bonds or other instruments in writing for the purpose of refunding, extending or unifying the whole or any part of its valid indebtedness from time to time outstanding, whether evidenced by notes, bonds, or other instruments in writing, which refunding notes, bonds or other instruments in writing shall not exceed in amount the principal of the outstanding indebtedness to be refunded and the accrued interest thereon to the date of such refunding.

"(8) To provide that all negotiable notes, bonds and other instruments in writing issued either pursuant to subdivision (6) or pursuant to subdivision (7) hereof shall be payable, both as to principal and interest, out of the revenues collected for the use of any facility or combination of facilities owned or operated or owned and operated by the Authority, or out of any other resources of the Authority, and may be further secured by a mortgage or deed of trust upon any property owned by the Authority. All notes, bonds or other instruments in writing issued by the Authority as herein provided shall mature in not to exceed thirty years from the date thereof, shall bear interest at a rate not exceeding six per cent per annum, and shall be sold for not less than ninety-five per cent of the par value thereof. The Authority shall have the power to prescribe the details of such notes, bonds or other

instruments in writing, and of the issuance and sale thereof, and shall have the power to enter into covenants with the holders of such notes, bonds or other instruments in writing, not inconsistent with the powers herein granted to the Authority, without further legislative authority.

"(9) To condemn any and all rights or property, of any kind or character, necessary for the purposes of the Authority, subject, however, to the provisions of this compact: *Provided, however,* That no property now or hereafter vested in or held by either State or by any county, city, village, township or other political subdivision, shall be taken by the Authority without the authority or consent of such state, county, city, village, township or other political subdivision. If the property to be condemned be situated in the State of Kansas, the said Authority shall follow the procedure of the Act of the State of Kansas providing for the exercise of the right of eminent domain, and if the property to be condemned be situated in the State of Missouri, the said Authority shall follow the procedure provided by the laws of the State of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways.

"(10) To petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other Federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, for the adoption of plans for and execution of any physical improvements, change in methods, rate of transportation, which, in the opinion of the Authority, may be designed to improve or better the handling of commerce in and through the District, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the District.

"(11) To perform all other necessary and incidental functions; and to exercise such additional powers as shall be conferred on it by the Legislature of either State concurred in by the Legislature of the other and by Act of Congress.

"ARTICLE IV.

"Nothing contained in this compact shall impair the powers of any county, municipality or other political subdivision to acquire, own, operate, develop or improve any facility which the Authority is given the right and power to own, operate, develop or improve.

"Nothing herein shall impair or invalidate in any way bonded indebtedness of either State or of any county, city, village, township or other political subdivision, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property or dedicating the revenues derived from any municipal property to a specific purpose.

"Unless and until otherwise provided, the Authority shall make an annual report to the Governor of each State, setting forth in detail the operations and transactions conducted by it pursuant to this compact and any legislation thereunder.

"ARTICLE V.

"The Authority shall consist of ten Commissioners, five of whom shall be resident voters of the State of Mis-

souri and five of whom shall be resident voters of the State of Kansas. All Commissioners shall reside within the District, the Missouri members to be chosen by the State of Missouri and the Kansas members by the State of Kansas, in the manner and for the terms fixed by the Legislature of each State except as herein provided.

"ARTICLE VI.

"The Authority shall elect from its number a chairman, a vice-chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

"Until otherwise determined by the Legislature of the two States, no action of the Authority shall be binding unless taken at a meeting at which at least three members from each State are present, and unless a majority of the members from each State, present at such meeting, shall vote in favor thereof.

"The two States shall provide penalties for violations of any order, rule or regulation of the Authority, and for the manner of enforcing same.

"ARTICLE VII.

"The Authority is authorized and directed to proceed to carry out its duties, functions and powers in accordance with the articles of this compact as rapidly as may be economically practicable and is vested with all necessary and appropriate powers not inconsistent with the Constitution or the Laws of the United States or of either State, to effectuate the same, except the power to levy taxes or assessments.

"In Witness Thereof, we have hereunder set our hands and seals under authority vested in us by law this twenty-eighth day of December, 1965.

"(Signed).

In the Presence of:

"(Signed)."

Sec. 2. (a) Any obligations issued and outstanding including the income derived therefrom, under the terms of the compact consented to in this Act, and any amendments thereto, shall be subject to the tax laws of the United States.

(b) Nothing in such compact shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer or official of the United States, in, over, or in regard to the territory which is embraced in the Kansas City Area Transportation District, as defined in such compact, or any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of such compact, or otherwise affected by the terms thereof, with the exception that the Kansas City Area Transportation Authority, as established in such compact, its affiliates and the transportation rendered by either, within such Kansas City Area Transportation District shall be exempt from the applicability of the provisions of the Interstate Commerce Act, as amended, and the rules, regulations, and orders promulgated thereunder, but such exception shall not affect the power or authority of the Interstate Commerce Commission to regulate and apply the provisions of the Interstate Commerce Act, as

amended, to other persons engaged in the transportation of passengers or property in interstate or foreign commerce within such Kansas City Area Transportation District or the transportation rendered by such other persons.

(c) No additional power or powers shall be exercised by such Kansas City Area Transportation Authority under part (11) of article III of such compact unless and until such power or powers are conferred upon such Authority by the legislature of one of the States participating in the compact, agreed to by the legislature of the other participating State, and consented to by the Congress of the United States.

(d) Congress or any committee thereof shall have the right to require the disclosure and furnishing of such information by the Authority as they may deem appropriate and shall have access to all books, records, and papers of the Authority.

(e) The consent of Congress to this compact is granted subject to the further condition that the Kansas City Area Transportation District and the Kansas City Area Transportation Authority shall not acquire, construct, maintain, operate, or lease to others for maintenance and operation any interstate toll bridge or interstate toll tunnel without prior approval of the Secretary of Commerce.

(f) The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved September 21, 1966.

APPENDIX D

Revised Statutes of Missouri

CHAPTER 238. TRANSPORTATION DISTRICTS [NEW]

KANSAS CITY AREA TRANSPORTATION DISTRICT AUTHORITY

KANSAS CITY AREA TRANSPORTATION DISTRICT AUTHORITY

238.010. Compact between Missouri and Kansas—powers and duties of authority

Within sixty days after October 13, 1965, the governor by and with the advice and consent of the senate shall appoint three commissioners to enter into a compact on behalf of the state of Missouri with the state of Kansas. If the senate is not in session at the time for making any appointment, the governor shall make a temporary appointment as in case of a vacancy. Any two of the commissioners so appointed, together with the attorney general of the state of Missouri, may act to enter into the following compact:

(Hereinafter follows Articles I through VII of Public Law 89-599 as set forth in Appendix C, *supra*.)

APPENDIX E

Kansas Statutes Ann.

COMPACTS BETWEEN MISSOURI AND KANSAS

12-2524. Kansas City area transportation district and authority compact; commissioners.

Within sixty (60) days after this section becomes effective, the governor by and with the advice and consent of the senate shall appoint three (3) commissioners to enter into a compact on behalf of the state of Kansas with the state of Missouri. If the senate is not in session at the time for making any appointment, the governor shall make a temporary appointment as in the case of vacancy. Any two (2) of the commissioners so appointed, together with the attorney general of the state of Kansas may act to enter into the following compact:

(Hereinafter follows Articles I through VII of Public Law 89-599 as set forth in Appendix C, *supra.*)

APPENDIX F

49 USC § 1a

§ 1a. Abandonment and discontinuance of rail service—Authorization pursuant to certification by Commission; application and notice of intent required in accordance with rules and regulations; statutory provisions applicable; limitation on authority of Commission

(1) No carrier by railroad subject to this chapter shall abandon all or any portion of any of its lines of railroad (hereafter in this section referred to as "abandonment") and no such carrier shall discontinue the operation of all rail service over all or any portion of any such line (hereafter referred to as "discontinuance"), unless such abandonment or discontinuance is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment or discontinuance. An application for such a certificate shall be submitted to the Commission, together with a notice of intent to abandon or discontinue, not less than 60 days prior to the proposed effective date of such abandonment or discontinuance, and shall be in accordance with such rules and regulations as to form, manner, content, and documentation as the Commission may from time to time prescribe. Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body. The authority granted to the Commission under this section

shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team, switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

Affidavit accompanying notice of intent; contents of affidavit and notice of intent

(2)(a) Whenever a carrier submits to the Commission a notice of intent to abandon or discontinue, pursuant to paragraph (1) of this section, such carrier shall attach thereto an affidavit certifying that a copy of such notice (i) has been sent by certified mail to the chief executive officer of each State that would be directly affected by such abandonment or discontinuance, (ii) has been posted in each terminal and station on any line of railroad proposed to be so abandoned or discontinued, (iii) has been published for 3 consecutive weeks in a newspaper of general circulation in each county in which all or any part of such line of railroad is located, and (iv) has been mailed, to the extent practicable, to all shippers who have made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12 months preceding such submission.

(b) The notice required under subdivision (a) shall include (i) an accurate and understandable summary of the carrier's application for a certificate of abandonment or discontinuance, together with the reasons therefor, and (ii) a statement indicating that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

Investigation by Commission; prerequisites; effect; scope; procedures

(3) During the 60-day period between the submission of a completed application for a certificate of abandonment or discontinuance pursuant to paragraph (1) of this section and the proposed effective date of an abandonment or discontinuance, the Commission shall, upon petition, or may, upon its own initiative, cause an investigation to be conducted to assist it in determining what disposition to make of such application. An order to the Commission to implement the preceding sentence must be issued and served upon any affected carrier not less than 5 days prior to the end of such 60-day period. If no such investigation is ordered, the Commission shall issue such a certificate, in accordance with this section, at the end of such 60-day period. If such an investigation is ordered, the Commission shall order a postponement, in whole or in part, in the proposed effective date of the abandonment or discontinuance. Such postponement shall be for such reasonable period of time as is necessary to complete such investigation. Such an investigation may include, but need not be limited to, public hearings at any location reasonably adjacent to the line of railroad involved in the abandonment or discontinuance application, pursuant to rules and regulations of the Commission. Such a hearing may be held upon the request of any interested party or upon the Commission's own initiative. The burden of proof as to public convenience and necessity shall be upon the applicant for a certificate of abandonment or discontinuance.

Issuance of certificate; contents; taking effect of abandonment or discontinuance

(4) The Commission shall, upon an order with respect to each application for a certificate of abandonment or discontinuance—

(a) issue such certificate in the form requested by the applicant if it finds that such abandonment or discontinuance is consistent with the public convenience and necessity. In determining whether the proposed abandonment is consistent with the public convenience and necessity, the Commission shall consider whether there will be a serious adverse impact on rural and community development by such abandonment or discontinuance;

(b) issue such certificate with modifications in such form and subject to such terms and conditions as are required, in the judgment of the Commission, by the public convenience and necessity; or

(c) refuse to issue such certificate.

Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this title and pursuant to section 565 of Title 45. If such certificate is issued without an investigation pursuant to paragraph (3) of this section, actual abandonment or discontinuance may take effect, in accordance with such certificate, 30 days after the date of issuance thereof. If such a certificate is issued after an investigation pursuant to such paragraph (3), actual abandonment or discontinuance may take effect, in accordance with such certificate, 120 days after the date of issuance thereof.

Diagram of transportation system directly or indirectly operated by carrier by railroad subject to this chapter; preparation, submission to Commission, and publication; contents; amendments; opposition to issuance or denial of certificate limited by diagram or amended diagram

(5)(a) Each carrier by railroad subject to this chapter shall, within 180 days after the date of promulgation of regulations by the Commission pursuant to this section, prepare, submit to the Commission, and publish, a full and complete diagram of the transportation system operated, directly or indirectly, by such carrier. Each such diagram which shall include a detailed description of each line of railroad which is "potentially subject to abandonment", as such term is defined by the Commission. Such term shall be defined by the Commission by rules and such rules may include standards which vary by region of the Nation and by railroad or group of railroads. Each such diagram shall also identify any line of railroad as to which such carrier plans to submit an application for a certificate of abandonment or discontinuance in accordance with this section. Each such carrier shall submit to the Commission and publish, in accordance with regulations of the Commission, such amendments to such diagram as are necessary to maintain the accuracy of such diagram.

(b) The Commission shall not issue a certificate of abandonment or discontinuance with respect to a line of railroad if such abandonment or discontinuance is opposed by—

(i) a shipper or any other person who has made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12-month period preceding the submission of an applicable application under paragraph (1) of this section; or

(ii) a State, or any political subdivision of a State, if such line of railroad is located, in whole or in part, within such State or political subdivision;

unless such line or railroad has been identified and described in a diagram or in an amended diagram which was submitted to the Commission under subdivision (a) at least 4 months prior to the date of submission of an application for such certificate.

Findings by Commission of public convenience and necessity permitting abandonment or discontinuance; publication in Federal Register; further findings of offers of financial assistance postponing issuance of certificate of abandonment or discontinuance; duration of postponement

(6) (a) Whenever the Commission makes a finding, in accordance with this section, that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad, it shall cause such finding to be published in the Federal Register. If, within 30 days of such publication, the Commission further finds that—

(i) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued; and

(ii) it is likely that such proffered assistance would—

(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or

(B) cover the acquisition cost of all or any portion of such line of railroad;

the Commission shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed 6 months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail services over such line. Upon notification to the Commission of the execution of such an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect.

(b) A carrier by railroad subject to this chapter shall promptly make available, to any party considering offering financial assistance in accordance with subdivision (a), its most recent reports on the physical condition of any line of railroad with respect to which it seeks a certificate of abandonment or discontinuance, together with such traffic, revenue, and other data as is necessary to determine the amount of assistance that would be required to continue rail service.

Determination by Commission subsequent to findings of offers of financial assistance of extent avoidable costs of rail service and reasonable return on rail properties exceed operating revenues

(7) Whenever the Commission finds, under paragraph (6) (a) of this section, that an offer of financial assistance has been made, the Commission shall determine the extent to which the avoidable cost of providing rail

service plus a reasonable return on the value of the rail properties involved exceed the revenues attributable to the line of railroad or the rail service involved.

Statutory provisions applicable to petitions filed and pending prior to February 5, 1976, or prior to promulgation of regulations by Commission

(8) Petitions for abandonment or discontinuance which were filed and pending before the Commission as of February 5, 1976, or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this title which were in effect on February 5, 1976, except that paragraphs (6) and (7) of this section shall be applicable to such petitions.

Injunctive relief; jurisdiction; parties; civil penalty

(9) Any abandonment or discontinuance which is contrary to any provision of this section, of any regulation promulgated under this section, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed $5,000 on each person who knowingly authorizes, consents to, or permits any violation of this section or of any regulation under this section.

Further findings by Commission of suitability of abandoned or discontinued properties for use for other public purposes; limitations on disposal subsequent to finding

(10) In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.

Definitions

(11) As used in this section:

(a) The term "avoidable cost" means all expenses which would be incurred by a carrier in providing a service which would not be incurred, in the case of discontinuance, if such service were discontinued or, in the case of abandonment, if the line over which such service was provided were abandoned. Such expenses shall include but are not limited to all cash inflows which are foregone and all cash outflows which are

incurred by such carrier as a result of not discontinuing or not abandoning such service. Such foregone cash inflows and incurred outflows shall include (i) working capital and required capital expenditures, (ii) expenditures to eliminate deferred maintenance, (iii) the current cost of freight cars, locomotives and other equipment, and (iv) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(b) The term "reasonable return" shall, in the case of a railroad not in reorganization, be the cost of capital to such railroad (as determined by the Commission), and, in the case of a railroad in reorganization, shall be the mean cost of capital of railroads not in reorganization, as determined by the Commission.

Feb. 4, 1887, c. 104, Pt. I, § 1a, as added and amended Feb. 5, 1976, Pub.L. 94-210, Title VIII, §§ 802, 809(c), 90 Stat. 127, 146; Oct. 19, 1976, Pub.L. 94-555, Title II, § 218, 90 Stat. 2628.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-808

KANSAS CITY AREA TRANSPORTATION AUTHORITY OF THE KANSAS CITY AREA TRANSPORTATION DISTRICT,
Petitioner,

vs.

JAMES G. ASHLEY, JR. and OLIVE J. ASHLEY, Individually and as Executrix of the ESTATE OF JAMES G. ASHLEY, SR. d/b/a KANSAS CITY PUBLIC SERVICE FREIGHT OPERATION,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT

Petitioner misstates, in its Petition for Writ of Certiorari to the Missouri Supreme Court en banc, the action of that Court and prays that a review be granted by this Court on grounds foreign to the opinion and ruling of the Supreme Court of Missouri in an effort to seek

a reversal here. The Petitioner ignores a previous precedent opinion of the Missouri Supreme Court and misstates its statutory authority of eminent domain as it relates to the taking of the property of an existing railroad which is a public utility. The Missouri Court of Appeals, Kansas City District, heard this case on appeal from a trial to a condemnation jury and rendered its opinion. That opinion is not reported but is included in Petitioner's Petition as Appendix B. The Missouri Supreme Court, en banc, in its review of this case, adopted one argument of the Respondents that challenged the Petitioner's right to condemn the railroad right of way of the Respondents as a matter of law, that the Missouri Court of Appeals, Kansas City District, did not address in its opinion on appeal. The Petitioner pleads that, because the joint act of the legislatures of the States of Missouri and Kansas establishing this Transportation Authority, consented to by the Congress of the United States, exempts this Petitioner from the jurisdiction of the Interstate Commerce Commission, it likewise exempts everything else over which the Petitioner seeks to exercise dominion. The Petitioner infers that those powers found in the Statutes of Missouri and Kansas and the Public Law enacted by the Congress of the United States gives the Petitioner a power greater than that of the sovereign power of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, en banc, included in the Petitioner's Petition as Appendix A, is reported at 555 SW2d 9. The opinion of the Missouri Court of Appeals, Kansas City District, Appendix B, is not reported.

QUESTIONS PRESENTED

1. Whether or not the Class II Freight Switching and Terminal Railroad, operating under a Certificate of Public Convenience and Necessity, granted by the Interstate Commerce Commission, and regulated by that Commission in accordance with 49 U.S.C., by the Respondents is subject to eminent domain proceedings in any court action against that railroad to take the railroad in its entirety.

2. Whether the Petitioner, declared by the Supreme Court of Missouri, not to be a political subdivision, has the superior power of eminent domain over any other public utility, when the Revised Statutes of Missouri, Sec. 238.010, declares that their authority to condemn, "shall follow the procedure provided by the laws of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways."

3. Whether the opinion of the Missouri Supreme Court, en banc, by its mention of 49 U.S.C. Sec. 1a(10) "interprets" the legal intent and meaning of such section of the Interstate Commerce Law.

STATEMENT OF THE CASE

The Statement of the Case as found in the brief of the Petitioner is correct in most instances; however, they do take poetic license in other areas and recite incorrect conclusions of the Law of Missouri. The Statement is also incomplete in reciting the history of this action by this Petitioner against this Respondent. The Respondent, endeavoring not to be repetitive, will supplement the Statement of the Petitioner.

The action by the Petitioner against the Respondents to take their Class II Railroad began in the State Court of Missouri. The authority of the Petitioner to maintain the action against the Respondents was immediately challenged in the trial court by motions to dismiss the petition on various grounds, including the ground upon which the Supreme Court of Missouri, en banc, ruled. When the efforts of the Respondents were not successful in the trial court, the Respondents then went to the United States Courts, asking for declarative relief on the grounds denied by the State Court to avoid a costly jury trial. The complaint of the Respondents was dismissed by the United States District Court for the Western District of Missouri on motion by the Petitioner here. An appeal was taken from the ruling of the United States District Court to the United States Court of Appeals, Eighth Circuit, No. 75-1743, who entered their opinion, which is not reported, on April 1, 1976. The Court of Appeals decision is included as Appendix 1. In that proceeding the Petitioner here asserted that there was no federal question involved to give the Federal Court system jurisdiction of the subject matter. The Petitioner's authority cited in its first point of Argument in the Court of Appeals cited 2 *Moore's Federal Practice*, #2.07; *Lock Joint Pipe Company* v. *Anderson*, (W.D.Mo., 1955) 127 F.Supp. 692 and *Haley* v. *Childers*, (8th Cir., 1963) 314 F2d 610. They now take a position 180 degrees from that direction.

As the opinion of the United States Circuit Court of Appeals states, the State court proceeding had been decided in favor of the Respondents and the Court of Appeals adopted the opinion and decision of the Western District of Missouri that agreed with the Petitioner here, that there was no federal jurisdiction involved.

The Respondents maintained their position that the Petitioner did not have a right to condemn their railroad. The State Courts of Missouri agreed with the Respondents and entered a dismissal. In their opinions, these courts never suggested that the Interstate Commerce Act preempted any act of Congress. The state courts consistently stated that the powers of the Petitioner were spelled out in the legislative acts of the States which were consented to by the Congress of the United States and that the Congress of the United States, in enacting Public Law 89-599, contained a specific limitation (Sec. 2(b)) and that the Petitioner here could not maintain eminent domain over the property of the Respondents.

In their rulings, the Missouri Court of Appeals decided the issues on the basic premise of Missouri eminent domain law and the power given the Petitioner, which they clearly stated did not include maintaining this cause of action against the Respondents. The Missouri Supreme Court chose not to decide the issues on the basis of the Missouri Court of Appeals, but recognized the regulatory authority of the Interstate Commerce Commission as it relates to railroads. The Missouri Supreme Court made no statement in its opinion that the Petitioner was regulated by, or subject to, the Interstate Commerce Act; but that the Respondent Railroad here was so regulated and controlled The State Courts of Missouri, then, made their rulings clear and concise and on different grounds and it would appear that this Petition for Writ of Certiorari is solely because of an adverse decision and not because of any conflict or difference of opinions between State Courts.

ARGUMENT

I.

Whether or not the Class II Freight Switching and Terminal Railroad, operating under a Certificate of Public Convenience and Necessity, granted by the Interstate Commerce Commission, and regulated by that Commission in accordance with 49 U.S.C., by Respondents is subject to eminent domain proceedings in any court action against that railroad to take the railroad in its entirety.

It has never been disputed that Respondents are a Class II railroad, switching and terminal. The Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission was admitted into evidence (R. 141, 143). Title 49, U.S.C.A., Sec. 1(18) of the Interstate Commerce Act states:

> "No carrier by railroad subject to this chapter shall . . . abandon all or any portion of a line of railroad, or the operation thereof, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.*" (emphasis supplied)

The power of eminent domain is granted by legislative enactment and is strictly construed in its application. The Government of the United States, in providing for the general welfare of its citizens, has seen fit to enact a law to regulate and control, in the public interest, railroads. Title 49 U.S.C.A. regulates carriers by railroad and the section quoted above is not subject to any mis-

understanding, for it is stated quite clearly that before there can be any change in, "all or any portion of a line of railroad," the Interstate Commerce Commission must issue its permit in the interest of public convenience and necessity. This section of the Interstate Commerce Act does not, nor does any section, yield to any eminent domain statute. If this was not so restricted and limited, the public convenience and necessity that this Act must protect would be subject to monopolistic takings based upon the financial position of the condemnor.

In its Petition for Writ of Certiorari here, Petitioner states in its brief, p. 8, that, "This was the first instance in this case where a court had specifically ruled that the Interstate Commerce Act preempted Public Law 89-599." This statement has to be total fantasy. The Supreme Court of Missouri made no such conclusion or ruling. Public Law 89-599 "preempts," using the verbiage of the Petitioner, the Petitioner from acting in any manner that invades previously established authority legislated by the United States. The preamble to Public Law 89-599 (Appendix C, p. A 21) makes this clear as it states:

> ". . . Subject to the provisions of Section 2 of this Act, . . .
>
> "Sec. 2 (b) Nothing in such compact shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, bureau, officer or official of the United States, in, over, or in regard to the territory which is embraced in the Kansas City Area Transportation District, as defined in such compact, or any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, . . ."

This limitation found in Public Law 89-599 specifically states that the Petitioner cannot bother any thing over which the Congress of the United States has legislated right, power or jurisdiction. The Petitioner takes the position that, because of a right of eminent domain granted them, limited and strictly construed as it is and must be, they can ignore this legislative limitation. In this assumption, the Petitioner feels and believes that the Congress of the United States and the States of Missouri and Kansas gave them greater power than that of the United States, which is not true.

II.

Whether the Petitioner, declared by the Supreme Court of Missouri not to be a political subdivision, has the superior power of eminent domain over any other public utility, when the Revised Statutes of Missouri, Sec. 238.010, declares that their authority to condemn, "shall follow the procedure provided by the laws of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways."

The Petitioner's authority to exercise eminent domain is not as all-encompassing as they want this Court to believe. The Supreme Court of Missouri has declared that the Petitioner is not a political subdivision in *Kansas City Area Transportation Authority* v. *James G. Ashley, Sr., et al.*, 478 SW2d 323, 324 (Mo. Sup. 1972):

> "We do not see in the statute creating the Kansas City Area Transportation Authority such a delegation of governmental functions as would constitute that agency a governmental unit . . ."

If the Kansas City Area Transportation Authority is not a political subdivision, then it is nothing more than a public utility.

The Missouri Statute 238.010 R.S.Mo. that established this Transportation Authority clearly grants the right of eminent domain to them but states that, if that right is exercised in Missouri, "the said Authority shall follow the procedure provided by the Laws of the State of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways." (Art. III (9)), which authority is no greater than any other public utility in the State of Missouri. There can be no inference of a superior power of eminent domain with the clarity contained in the Law and in the Supreme Court of Missouri's interpretation of that Law.

In *Kansas City* v. *Ashley*, 406 SW2d 584, 588 (Mo. Sup. 1966) the Court said:

> "In making the argument appellant recognizes the exception when the condemnor seeks 'to devote same to a conflicting or inconsistent use.' The general rule is stated in 29A C.J.S. Eminent Domain, Sec. 74, page 326: ' . . property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient,' and this rule has been held to apply except 'where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, . . . rather than by a . . . municipality.' State ex rel. State Highway Commission v. Hoester, Missouri, 362 SW2d 519, 522

(2, 3). This rule has been applied in respect to taking a railroad for a street, e.g. . . . a power to appropriate the property of the railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of the organization,' could not be inferred. City of Hannibal v. Hannibal & St. Joseph Railroad Co., 49 Mo. 480, 481."

Obviously the contended superior power of eminent domain by the Petitioner is without basis in the statutes or anywhere else.

III.

Whether the opinion of the Missouri Supreme Court, en banc, by its mention of 49 U.S.C. Sec. 1a(10) "interprets" the legal intent and meaning of such section of the Interstate Commerce Law.

The matter of the noted section in the Interstate Commerce Act is included in the opinion of the Missouri Supreme Court. Nowhere in the opinion does that Court take upon itself to rule on the merits of something relating to this case that might appear before that Commission. The Missouri Supreme Court adopted the Respondents first point of error made no appeal in the State court when the Respondents charged that the trial court erred as to jurisdiction over the subject matter. It is true that the learned judge of the Supreme Court writing the opinion commented on some of the phases that might take place and some of the matters that it might include, but a careful look at that opinion and one will readily recognize that it is devoid of quotable authority and thus not likely for use under the doctrine of *stare decisis*. The Petitioner has included this dramatic issue in its Petition for Writ of Certiorari, hopefully to

gain the attention of this Court in an effort to override the decision in the State Court. There is no interpretation by the Supreme Court of Missouri of 49 U.S.C. 1a(10) and, therefore, nothing for this court to review.

CONCLUSION

The Petitioner asks this court to review this case, stating many things that are nothing more than enticements. They speak of "ATA's Dilemma" and they quote Mr. Justice Frankfurter regarding that this Court must have final power to pass upon the meaning and validity of compacts, etc. All of this is very nice; however, the Petitioner here wants to take the property of the Respondents in a manner that is contrary to the Law of the United States and contrary to the Law of Missouri and the Missouri State Courts, who this Petitioner said unequivocally should rule on it, have thoroughly reviewed this and have ruled. There is no challenge as to the validity of the compact of the states and this "twentieth century urban transportation problem" does not abrogate the constitutional rights of private citizens just because some uncontrolled, unregulated, tax-supported transportation system says that they are greater than the laws of the United States.

The Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Kansas City, Missouri 64111
Attorney for Respondents

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75-1743

James G. Ashley, Jr., and Olive J. Ashley, Partners,
d/b/a Kansas City Public Service
Freight Operation,
Appellants,

v.

Kansas City Area Transportation
Authority,
Appellee.

Appeal From the United States District Court
for the Western District of Missouri

Submitted: March 11, 1976

Filed: April 1, 1976

Before LAY, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

In April 1970, the Kansas City Area Transportation Authority (ATA) instituted condemnation proceedings in Missouri state court against the Class II railroad owned by the Ashleys. In their answer, the Ashleys asserted, *inter*

alia, that under federal law the ATA was not authorized to condemn the railroad.[1]

In December 1972, the Ashleys sought declaratory and injunctive relief in federal district court in a similar attempt to prohibit the ATA from maintaining the state condemnation proceeding against the railroad. The district court, the Honorable Elmo B. Hunter presiding, dismissed the action for lack of subject matter jurisdiction, finding that the federal question Ashleys asserted was rather a federal question defense to the state court condemnation action. *See Chandler* v. *O'Bryan*, 445 F.2d 1045, 1055 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). This appeal followed.

We affirm the dismissal on the basis of the district court's opinion.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

[Not to be published].

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1. At oral argument the parties informed the court that the state case has now been decided by the Missouri Court of Appeals in the Ashleys' favor under state law; the ATA has applied for discretionary transfer to the Missouri Supreme Court.